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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

ORACLE AMERICA, INC., a Delaware  
 corporation; ORACLE INTERNATIONAL  
 CORPORATION, a California corporation

Case No.: 3:16-cv-02090-JST

**JOINT CASE MANAGEMENT  
 CONFERENCE STATEMENT**

Plaintiffs,

Date: September 28, 2016

v.

Time: 2:00 p.m.

Place: Courtroom 9

Judge: Honorable Jon S. Tigar

BERND APPLEBY; JAMES OLDING;  
 TERIX COMPUTER COMPANY, INC., a  
 California corporation; TUSA, INC., a  
 Delaware corporation; ERMINE IP, INC., a  
 Delaware corporation; and ERMINE  
 SERVICES, LLC, a Delaware company; and  
 DOES 1–50,

Defendants.

1 Plaintiffs Oracle America, Inc., and Oracle International Corporation (“Oracle” or  
 2 “Plaintiffs”) and Defendants Bernd Appleby (“Appleby”), James Olding (“Olding”), TERiX  
 3 Computer Company, Inc. (“Terix”), TUSA, Inc. (“TUSA”), Ermine IP, Inc. (“Ermine IP”), and  
 4 Ermine Services, LLC (“Ermine Services”) (collectively, “Defendants”) jointly submit this Joint  
 5 Case Management Conference Statement, pursuant to Civil Local Rule 16-10.

## 6 **1. Jurisdiction & Service**

7 This Court has subject matter jurisdiction over Plaintiffs’ federal Copyright Act claim  
 8 under 17 U.S.C. §§ 101 *et seq.*, U.S.C. § 1331 and 28 U.S.C. § 1338. This Court has  
 9 supplemental subject matter jurisdiction over the pendant state law claims under 28 U.S.C.  
 10 § 1367. Plaintiffs contend that this Court also has ancillary jurisdiction over Plaintiffs’ third  
 11 cause of action. All parties named in Plaintiffs’ complaint have been served.

## 12 **2. Facts**

### 13 **a. Plaintiff Oracle’s Statement**

14 Oracle interprets Local Rule 16-10(d) to mean that this CMC statement should only  
 15 include progress or changes since the last CMC statement (ECF No. 61) was filed. Nonetheless,  
 16 Oracle includes the entire statement at Defendants’ request.

17 Oracle sued Terix and its affiliates in July 2013 for copyright infringement and related  
 18 claims. During discovery, the full scope of Terix’s copyright infringement – and ultimately, the  
 19 role that Terix’s principals, Appleby and Olding, played in directing it – came to light. Faced  
 20 with enormous and undisputed liability, Terix settled, and on June 10, 2015, Terix stipulated to  
 21 judgment against it on Oracle’s claims. The federal court judgment required Terix to pay  
 22 \$57,723,000 in damages and contained a permanent injunction against further copyright  
 23 infringement.

24 In anticipation of the federal judgment, Appleby and Olding began implementing their  
 25 fraudulent transfer scheme to try to evade the judgment and settlement by creating TUSA, Ermine  
 26 IP, and Ermine Services. In February 2016, Appleby and Olding then caused Terix to transfer  
 27 substantially all of its assets to TUSA, Ermine IP, and Ermine Services, leaving Terix with  
 28 nothing and stiffing Oracle on the federal judgment the settlement. TUSA, Ermine IP and Ermine

Services now collectively do business, and earn profits, under the name “Terix,” using the former Terix assets. Meanwhile, the Terix entity subject to the federal judgment is penniless and in default on its debt to Oracle.

Oracle filed its First Amended Complaint on June 30, 2016, alleging three claims:

- (1) Copyright Infringement - Vicarious and Contributory Liability (Against Appleby and Olding);
- (2) Alter Ego Liability (Against Appleby and Olding);
- (3) Fraudulent Transfer - Cal. Civil Code § 3439, *et seq.* (against all Defendants);

Though Defendants have not yet answered the Complaint, certain factual issues appear to be in dispute. These issues include:

- The extent to which Appleby and Olding controlled, directed, intentionally encouraged, induced, or materially contributed to Terix’s unlawful copying and distribution of Oracle’s copyrighted software;
- The extent to which Appleby and Olding used the Terix Defendants as shell companies without respect for the corporate form to benefit themselves;
- Whether Appleby and Olding fraudulently transferred Terix’s assets to TUSA, Inc., Ermine IP, Inc., and Ermine Services, LLC.

#### **b. Defendants’ Statement**

Oracle’s claim for copyright infringement against Appleby and Olding is identical to the claim it alleged in its prior action (“Terix I”) against Terix, Sevanna, Financial Inc. (“Sevanna”), and West Coast Computer Exchange (“WEX”). Notwithstanding that they vigorously disputed liability, the Terix I defendants stipulated to a judgment providing for a monetary award on Oracle’s copyright claim against only themselves and injunctive relief against both themselves and their officers. Appleby and Olding are in privity with at least one of the Terix I judgment debtors and the claim is thus barred under principles of claim preclusion.

There is no unity of interest between Appleby and Olding and any of the Terix I judgment debtors as required for application of the alter ego doctrine. Nor can Oracle establish that it would suffer an inequitable result absent application of the doctrine since, among other things, Oracle was aware of the very facts on which it bases its alter ego claim when it negotiated the stipulated judgment in Terix I. Oracle’s alter ego claim is an impermissible end-run around the doctrine of

1 res judicata.

2 An assignment for the benefit of creditors is a well-recognized business liquidation  
3 procedure that is an alternative to a chapter 7 bankruptcy proceeding. Terix made the assignment  
4 at issue to the entity known as Terix (assignment for the benefit of creditors) LLC (“Terix  
5 ABC”)—an entity established and controlled by Sherwood Partners, Inc. (“Sherwood”).  
6 Defendants had no control over Sherwood, which is a national specialist in assignment for the  
7 benefit of creditors proceedings. The assignment made by Terix to Terix ABC is not actionable  
8 as a voidable transfer under California’s Uniform Voidable Transfer Act (“UVTA”).

### 9 **3. Legal Issues in Dispute**

#### 10 **a. Plaintiff Oracle’s Statement**

11 Legal issues presently in dispute between the Parties include:

- 12 • Whether Oracle may pursue copyright infringement claims based on vicarious and  
13 contributory liability against Appleby and Olding;
- 14 • Whether Appleby and Olding were the alter egos of the Terix Defendants;
- 15 • Whether the transfer of Terix’s assets violated the California Uniform Voidable  
16 Transactions Act.

#### 16 **b. Defendants’ Statement**

17 In addition to the issues stated by Oracle, the legal issues in dispute include:

- 18 • Whether Oracle can establish the inequitable result element of its alter ego claim  
19 based on facts of which it was aware when it negotiated the stipulated judgment.
- 20 • Whether the assignment for the benefit of creditors made by Terix to Terix ABC is  
21 actionable under the UVTA as a matter of law.
- 22 • Whether Terix (assignment for the benefit of creditors) LLC is an indispensable  
23 party regarding Oracle’s UVTA claim.

### 24 **4. Motions**

25 Defendants filed motions to dismiss on July 28, 2016, and the motions were fully briefed  
26 as of August 18, 2016. The Court heard oral argument on September 1, 2016.

### 27 **5. Amendment of Pleadings**

28 Oracle filed its First Amended Complaint on June 30, 2016.

**6. Evidence Preservation**

The parties certify that they have reviewed the Court's ESI Guidelines and confirm that they have discussed and taken steps to preserve ESI and will continue to do so.

**7. Disclosures**

The parties made their initial disclosures under Rule 26(a) on July 29, 2016.

**8. Discovery Status**

**a. Discovery Taken To Date**

**(1) Party Discovery**

Oracle served its first sets of Requests for Production of Documents on each Defendant on July 15, 2016. Defendants served their responses on August 17, 2016. Defendants Appleby, Olding, TUSA, Inc., Ermine IP, Inc., and Ermine Services, LLC have made two initial productions to Oracle as of August 31, 2016. The parties met and conferred regarding Defendants' responses on September 13, 2016. Defendants Appleby, Olding, TUSA, Inc., Ermine IP, Inc., and Ermine Services, LLC have agreed to produce additional responsive documents by September 26, 2016.

Defendants Appleby and Olding served their first set of Requests for Production of Documents on August 5, 2016. Oracle served its responses on September 9, 2016. Oracle made an initial production of documents on September 16, 2016.

On August 30, 2016, the Court entered the parties' Stipulated Protective Order.

**(2) Non-Party Discovery**

Oracle served document subpoenas on Sherwood Partners and Terix (Assignment for the Benefit of Creditors), LLC on July 20, 2016. Sherwood made an initial production of documents on September 15, 2016.

**(3) Oracle's Additional Statement**

Defendant Terix Computer Company, Inc. takes the position that it has no responsive documents, having transferred them (along with the rest of its possessions) in the February 17, 2016 general assignment. Oracle disagrees and reserves its rights on this issue. Regardless, Defendants have confirmed that all documents that were in Terix's possession immediately

1 before the February 17 general assignment and Asset Purchase Agreement are now in the  
2 possession of TUSA, Ermine IP and Ermine Services.

#### 3 (4) Defendants' Additional Statement

4 Regarding the topic of "8. Discovery," this Court's form Joint Case Management  
5 Statement provides for the identification of, among other things, "any identified discovery  
6 disputes." Defendants contend that Oracle's Additional Statement does not describe a pending  
7 discovery dispute and is superfluous.

##### 8 b. Rule 26(f)(3)(A): Initial Disclosures

9 See Section 7 above.

##### 10 c. Rule 26(f)(3)(B): The Scope Of Anticipated Discovery And 11 When It Should Be Completed

#### 12 (1) Oracle's Position

13 To support its claims, Oracle anticipates discovery regarding Appleby and Olding's  
14 control and direction over Terix's infringement, Appleby and Olding's abuse of corporate forms  
15 concerning the Terix Defendants, and the transfer of Terix's assets.

16 Oracle has commenced or anticipates seeking discovery on at least the following topics:

- 17 • Appleby and Olding's involvement and control over Terix's operations;
- 18 • Payments to Appleby and Olding from Terix;
- 19 • Whether the Terix Defendants adhered to corporate formalities;
- 20 • Information concerning Defendants' finances, assets and liabilities;
- 21 • Formation of TUSA, Ermine IP, and Ermine Services;
- 22 • Transfer of Terix's assets including efforts to sell to other parties;
- 23 • Defendants' prioritization of payments to Terix's creditors other than Oracle;
- 24 • TUSA, Ermine IP and Ermine Service's customer relationships and relationships  
with other creditors, including whether these Defendants represent that they are  
merely a continuation of Terix

#### 24 (2) Defendants' Statement

25 Defendants' anticipated discovery includes, in addition to certain of the topics listed by  
26 Oracle: (i) Oracle's knowledge at the time of the stipulated judgment in Terix I of the facts on  
27 which it now bases its claims; (ii) Oracle's knowledge of the marketing of Terix Inc.'s assets for  
28 sale prior to the assignment; (iii) the formation and management of Terix ABC by Sherwood

Partners, Inc.; and (iv) attempts by Oracle to interfere with the business of Terix, Sevanna and WEX.

**d. Rule 26(f)(3)(C): Issues About Electronically Stored Information (“ESI”)**

The parties are currently negotiating the format for the production of ESI.

**e. Rule 26(f)(3)(D) & (F): Claims Of Privilege Or Protection**

The Court entered a protective order on August 30, 2016. ECF No. 72.

The parties have stipulated out of the privilege log requirements stated in *Burlington Northern v. District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005), and therefore agree that the service of a privilege log within 45 days after the production of the associated documents preserves the party’s privilege objections. The parties agree that communications with counsel of record related to this litigation or dispute (even if made prior to the filing of the Complaint) need not be logged.

**f. Rule 26(f)(3)(E): Changes To Discovery Limits**

**(1) Interrogatories**

**(a) Oracle’s Proposal**

Oracle proposes a limit of 25 interrogatories for Plaintiffs collectively and Defendants collectively, rather than 25 per party. Since the Defendants are all owned and controlled by Appleby and Olding, limiting the number of interrogatories for each side is more efficient.

**(b) Defendants’ Proposal**

Oracle’s alter ego and fraudulent transfer claims raise factually distinct issues with respect to each of the following respectively: (i) Appleby; (ii) Olding, and (iii) the entity Defendants. For purposes of the number of interrogatories allowed in this case under F.R.C.P. 30(a), Defendants propose that: (i) both of the Oracle plaintiffs be considered one party; (ii) defendant Appleby be considered one party; (iii) defendant Olding be considered one party; and (iv) Terix, TUSA Inc., Ermine IP, Inc., and Ermine Services, LLC be considered one party.

**(2) Depositions**

The parties disagree on the appropriate limitation on depositions, as explained below.



1 However, the parties agree that, per Fed. R. Civ. Proc. 30(a)(2)(A)(i), whichever limitation is  
 2 adopted should be per side, not per party, i.e., that Plaintiffs collectively and Defendants  
 3 collectively are each treated as a “party” for the purpose of deposition limits.

#### 4 (a) Oracle’s Proposal on Depositions

5 *Hours-based limits:* Oracle proposes an hours-based limit on depositions, rather than a  
 6 numbers-based limit. Oracle proposes that, in addition, the parties not be limited to one Rule  
 7 30(b)(6) notice and that a witness may be called in his or her individual capacity separately even  
 8 if he or she is designated a Rule 30(b)(6) witness.

9 Using an hours-based limit provides flexibility to keep depositions short where the  
 10 deponent’s knowledge is limited, or to take a full day of deposition where the witness’s  
 11 knowledge warrants it. Third-party depositions are particularly likely to take less than a full day.  
 12 Setting deposition limits in terms of hours encourages the efficient use of deposition time, and  
 13 discourages questioning any individual witness longer than necessary. Oracle proposes 120 total  
 14 hours of depositions for each side (Plaintiffs collectively and Defendants collectively).

#### 15 (b) Defendants’ Proposal

16 Defendants propose that all current Plaintiffs and all current Defendants be considered one  
 17 party for purposes of the number of depositions allowed a party under Rule 30(a) without leave of  
 18 court (*i.e.*, ten). Defendants do not believe it would be appropriate to otherwise modify the  
 19 Federal Rules of Civil Procedure.

### 20 9. Class Actions

21 This case is not a class action.

### 22 10. Related Cases

23 The Court issued a Related Case Order on May 4, 2016. The Order related this case to  
 24 *Oracle America, Inc. v. Terix Computer Company, Inc.*, Case No. 13-cv-03385-JST.

### 25 11. Relief

26 Oracle seeks injunctive relief, damages to be proven at trial, restitution, punitive damages,  
 27 prejudgment interest, fees and costs. Oracle is seeking a judgment that would make Appleby and  
 28 Olding jointly and severally liable for the \$57 million judgment against Terix. Oracle is also



1 seeking an avoidance of the transfer of Terix's assets to TUSA, Ermine IP, and Ermine Services.

2 **12. Settlement and ADR**

3 On July 15, 2016, the parties jointly filed with the Court a Notice of Need for ADR Phone  
4 Conference. On July 28, 2016 the parties participated in the ADR phone conference.

5 **13. Consent To A Magistrate For All Purposes**

6 After the Court issued the Related Case Order, this case was no longer assigned to a  
7 Magistrate Judge.

8 **14. Other References**

9 This case is not suitable for reference to binding arbitration, a special master, or the  
10 Judicial Panel on Multidistrict Litigation.

11 **15. Narrowing of Issues**

12 The parties are not presently aware of any issues that can be narrowed by agreement.

13 **16. Expedited Schedule**

14 This case is not suitable for handling under the Expedited Trial Procedure of General  
15 Order 64.

16 **17. Scheduling**

17 The parties propose the following schedule:

18	Deadline to amend pleadings and	
19	add new parties	11/16/2016
20	Close of Fact discovery	3/3/2017
21	Expert reports due for issues on which	
22	a party bears the burden of proof	4/7/2017
23	Rebuttal expert reports due	5/5/2017
24	Expert discovery cut-off	6/9/2017
25	Dispositive Motion Cut-off	7/20/2017
26	Pretrial Conference	8/9/2017
27	Trial	8/28/2017

1                   **18. Trial**

2           Oracle has requested a trial by jury. The parties estimate 10-14 trial days. Defendants  
3 contend that significantly less trial time will be required if Oracle's claim for copyright  
4 infringement is not at issue.

5                   **19. Disclosure Of Non-Party Interested Entities Or Persons**

6           Oracle filed its Certification of Interested Entities or Persons pursuant to Fed R. Civ. P.  
7 7.1 and Civil Local Rule 3-16 on April 20, 2016. Dkt. 2. Defendants filed their certification on  
8 May 18, 2016. Dkt. 27.

9                   **20. Other**

10          Pursuant to Federal Rule of Civil Procedure 5(b)(2)(E), the parties consent to service by  
11 email on counsel of record where service is required (i.e., unless service is unnecessary because  
12 filing with the Court's ECF system already accomplishes service) on condition that the title of the  
13 document or an abbreviation thereof is included in the subject line of the email. The parties agree  
14 that Fed. R. Civ. Proc. 6 applies to email service and the parties will be given the additional three  
15 days to respond.

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1 Dated: September 19, 2016

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4 By: /s/ Thomas S. Hixson

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8 Dated: September 19, 2016

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14 Dated: September 19, 2016

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**ATTESTATION**

I, Thomas S. Hixson, am counsel for Oracle America, Inc. and Oracle International Corporation. I am the registered ECF user whose username and password are being used to file this Stipulation. In compliance with LR 5-1(i)(3), I hereby attest that the above-identified counsel concurred in this filing.

Dated: September 19, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Thomas Hixson

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